No. 2460

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK D. COOPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GEORGE HEATON,

Defendant not joining in appeal.

No. 2460.

APPELLANT'S REPLY BRIEF.

JAMES A. WALSH,

Solicitor for Appellant.

NAEGELE PRINTING CO., HELENA, MONT.

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I have received the brief of the learned counsel for the Appellee. I will not again discuss the facts in the case, but beg leave to briefly refer to the position taken by counsel with reference to the Judgment, as most of the brief is devoted to that subject.

It is unnecessary to cite further authorities upon the point that a decree must be within the issues presented by the pleadings and supported by

the evidence. A prayer for general relief does not give the Court authority to render a decree, not within the issues and the evidence. This proposition is supported by the authorities cited by the Appellee.

I beg leave to continue Counsel's quotation from Lockhart vs. Leeds.

> "We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that, in substance, is what is held in the above cases."

And his quotation from Tyler vs. Savage says that the relief granted "Was consonant with the facts set out in the bill and agreeable to the case made by the bill."

It is unnecessary to further discuss this feature of the case. The learned counsel for the appellee realizes the force of these authorities and enters a plea of confession and avoidance by contending that the Court may remand the case to the lower Court to amend the pleadings, and for such other proceedings as may be just. This is not a case in which that may be done.

It is true that in some equity cases a bill may be so framed that alternative relief may be granted. The relief granted must be within the rules and principles of equity. A bill cannot be framed to demand equitable relief, and as an alternative to demand legal relief or relief that could be obtained in an action at law.

When the Government is dealing with its citizens or others under contracts, and in litigation affecting property rights, it is bound by the same rules as an individual. It has no greater rights. It is not acting in its sovereign capacity, but acting in the same right as an individual would.

Bostwick vs. U. S., 94 U. S. 53;
In re Smoots case, 15 Wallace, 36;
Amoskeag Mfg. Co., 17 Wallace, 592.

In matters relating to land, the Government has no greater rights than any other land proprietor, and in all suits affecting the same is bound by the same rules. It is elementary that if a party claims that he was induced to enter into a contract, or to part with property by fraud or through fraudulent representations, he has his choice of remedies, to rescind the contract, or affirm the contract and sue for the value of the property obtained. One is a suit in equity, the other is an action at law. He must elect whether he will rescind the contract, or affirm it and sue for the value of the property obtained, but he cannot do both. The Government, therefore, must elect to bring a suit to cancel the patent, or to affirm the patent, and sue for the value of the land. It cannot, in the same action, ask to rescind the contract, that is to cancel the patent, and ask to recover the value of the land in case the contract cannot be rescinded; or, in other words, that the patent cannot be cancelled. This is elementary. Having elected to bring an action to

cancel the patent, it is bound by its election, and cannot then ask to recover the value of the land because the patent cannot be cancelled.

Peters vs. Bain, 133 U. S. 670;

Rob vs. Vos, 155 U. S. 13;

Wesley vs. Diamond, 109 Pac. 524;

Wilson vs. Cattle Co., 73 Fed. 994; 20 C. C. A. 241;

Wheeler vs. Dun, 22. Pac. 827;

Bank vs. Board of Commissioners, 60 Pac. 1062;

Gaffney vs. Megrath, 63 Pac. 520.

An amendment cannot be allowed that will change the nature of the cause of action from a suit in equity to an action at law, or from an action at law to a suit in equity.

A suit to cancel a patent is a suit in equity. An action to recover the value of the land would be an action at law, and a Court of equity would not have jurisdiction.

U. S. vs. Bitter Root Development Co., 200 U. S. 451.

I respectfully submit that the judgment should be reversed and the action dismissed, and that the pleadings cannot be amended as suggested by Counsel for the Appellee.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellant.

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